IN THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEAL NO. 113 OF 1997

1. M/s. Engineers Combine,
   a registered partnership firm
   and its partners,

2. Shri Rajendra Somnath Upasani,

3. Shri Subhash Gajanan Kulkarni,

   All having their offices at
   T-3, Central Mansion, near
   State Bank of India, Ponda, Goa. ..... Appellants.

V/s.

1. M/s. Nova Dhatu Udyog Limited,
   a Company incorporated under the
   Indian Companies Act, 1956, having
   its registered Office at 22, Community
   Centre, Basant Lok Vasant Vihar,
   New Delhi – 110 057, and a site
   office at Assolda, Quepem, Goa.

2. Shri R.K. Jain, Contractor,
   C/o. Nova Dhatu Udyog Ltd.,
   Assolda, Quepem, Goa. ..... Respondents.

Mr. U.S. Kolwalkar, Advocate for the appellants.

Respondents absent.

CORAM : N.A. BRITTO, J.

DATE OF RESERVING THE JUDGMENT :
APRIL 13, 2004.

DATE OF PRONOUNCING THE JUDGMENT:
APRIL 27, 2004.

J U D G M E N T :

The appellants herein are the plaintiffs in Special Civil Suit No.52/1991 and they have filed the present appeal against the Judgment and Decree dated 19.2.1997 of the learned Civil Judge, Sr. Division, Quepem, dismissing the said suit.

2. Briefly stated, it was the case of the plaintiffs that theirs was a registered firm and defendant No.1 ('the defendant' for short) was a company which approached the plaintiffs to carry out test piling and regular piling work at their pig iron plant at Village Assolda and in response to the said letter dated 21.10.1991, the plaintiff had submitted their quotation on 23.10.1991, setting out certain terms and conditions and by letter of 24.10.1991, the plaintiffs had informed the defendant about their experience for 15 years in similar works and the defendant by their letter dated 26.10.1991 awarded to the plaintiffs the said work and somewhere on or about 18.11.1991, the plaintiffs moved its plant and machinery to the defendant's site in order to commence the work and whenever the work was completed, joint statements were prepared and signed by the representatives of the plaintiffs and the defendant.

3. The plaintiffs stated that however such joint statements did not cover the entire work done by the plaintiffs and there were certain other works which were completed by the plaintiffs. But the joint statements recorded were not

signed by the defendant or its representative.

4. The plaintiffs stated that after completion of the part of the work, the plaintiffs submitted two running bills to the defendant, the first dated 5.12.1991 for Rs.1,28,851-50 and the second dated 20.12.1991 for Rs.2,55,239.50. The plaintiffs stated that the second bill shows the total amount due after taking into account the payment of Rs.70,000/-, but the said bills did not cover the entire amount due to the plaintiffs by the defendant.

5. The plaintiffs stated that the defendant paid a sum of Rs.70,000/- as on the date of submission of the second bill and on 23.12.1991 the defendant paid to the plaintiff a sum of Rs.35,000/- and the defendant was disputing certain works which were done by the plaintiffs.

6. The plaintiffs stated that on 19.12.1991, the defendant's representative orally ordered the plaintiffs not to go ahead with the work, thereby terminating the contract. The plaintiffs stated that the defendant owes a sum of Rs.8,32,239.50 to the plaintiffs, out of which Rs.2,20,239-50 was in respect of the balance amount of the the bill for Rs.3,12,000/- towards piling charges as per the contract and Rs. 3,00,000/- towards the compensation for taking away the work.

7. The plaintiffs stated that the plaintiffs employed six sets of machines at the

site for the work of the defendant and also work force was engaged by the plaintiffs who had to remain idle at the site, as a result of which, the plaintiffs sustained heavy losses. The plaintiffs stated that the defendant did not assign any reason to abruptly discontinue the work and the plaintiffs had not done anything which entitled the defendant to abruptly terminate the contract and the order terminating the contract was illegal and, therefore, the defendant was liable to compensate the plaintiffs for all losses sustained by it. The plaintiffs, therefore, claimed a sum of Rs.8,32,239-50 from the defendant with interest at the rate of 21 % from 19.12.1991 till the entire payment.

8. The defendant contested the suit by filing a written statement, but the suit proceeded ex-parte against the defendant by virtue of the Order of the trial Court dated 19.11.1996. The defendant has also not contested the present appeal though the defendant was duly served.

9. At the time of arguments, learned Advocate Shri Kolwalkar, on behalf of the plaintiffs, has submitted that the suit was initially filed against defendant No.2 with a view to obtain an injunction against him. At present, no claim of the plaintiffs survives against him. In the memorandum of the appeal, the plaintiffs have made it clear that they are restricting this appeal to the recovery of Rs.3,12,000/- towards idling charges and payment for incomplete works and Rs.3,00,000/- towards the compensation for termination of the agreement.

10.The plaintiffs examined one of their partners, viz. PW.1, Shri Rajendra Upasani who, inter alia, stated that by letter dated 26.10.1991 the defendant awarded the work of piling to them. He produced the said letter dated 26.10.1991 at Exhibit PW.1/E, by which , inter alia, the defendant requested the plaintiffs to mobilise men and material at their site immediately to complete the work in shortest possible time. PW.1 Shri Upasani further stated that somewhere on 18.12.1991, they mobilised the piling plant and equipment consisting of six sets of machine, out of which three were belonging to them and the remaining three were hired from Bombay and out of 450 piles, they completed the work of 45 piles and the work of five piles was in progress. He further stated that they submitted two bills - one dated 5.2.1991 and the other dated 20.12.1991 and that the first bill (for Rs. 1,28,851-50) was paid in instalments and the second bill (for Rs.2,55,239/-) was paid after filing of the suit. He further stated the work of piling at five places was in progress and the joint statements could be signed only after completion of the work and, therefore, the bills were not prepared for those piling works at five places. He further stated that on 19.12.1991, the defendant's representative came to the site and verbally informed that the contract was terminated and that the actual amount due for the work done was Rs.2,20,239-50 as on 8.1.1992 and by way of idling charges for plant and personnel a sum of Rs.3,12,000/- was due to them by the defendant, in addition to a sum of Rs.3,00,000/- due towards the compensation of account of the loss due to termination of the contract. There is no reason why the

defendant terminated the contract, nor the defendant assigned any reason. He stated that there was a provision in the quotation in respect of idling charges of Rs.2,000/- per day which was accepted by the defendant. He stated that the machinery at the site remained idle from 19.2.1991 to 5.1.1992. For three sets of machinery, as the defendant did not make payment, the defendant had to pay idling charges and for the remaining three machines from 19.12.1991 to 8.1.1992. He further stated that the idling charges for the plant amounted to Rs.1,08,000/- for three sets of machines and Rs.1,26,000/- for other three sets and for personnel an amount of Rs.51,835/- and Rs.26,165/- for the works done and amount not paid and in this manner, the total dues for idling charges worked out to Rs.3,12,000/-. He further stated that they assessed loss of profits at Rs.3,00,000/- taking into consideration the balance work that was taken away from them due to premature termination of the contract, without assigning any reason. He further stated that by acceptance letter the entire work of 450 piles was allotted to them and there was no specific time limit to complete the same. He stated that specialised persons were called from Tamilnadu to complete the work within shortest possible time. He also stated that they had sent a letter dated 23.12.1991 asking for the reason for termination of the contract, but the defendant did not reply to the same. He stated that they paid Rs.8,010/- by way of transport charges for transportation of the hired machines back to Bombay and he produced xerox copies of the receipts at Exhibit PW.1/I colly.

11.On behalf of the plaintiffs, reliance has been placed on the case of ***Col. D.I. Mac Pherson vs. M.N. Appanna and another,*** (AIR (39) 1951 SC 184) in support of the proposition that a contract could be completed by letters.

12.Shri Kolwalkar has submitted that the contract to carry out the piling work by the plaintiffs for the defendant had taken place through correspondence and that the reliefs in this appeal have been sought by the plaintiffs only against the defendant. Shri Kolwalkar has further submitted that the plaintiffs had examined their Partner, on oath, and though there was no other evidence produced by the plaintiffs , yet the statement made on oath by the said Partner has not been accepted by the learned trial Court. Shri Kolwalkar has further submitted that in case the plaintiffs had completed the entire work, then the plaintiffs would have earned profits for doing the work of 450 piles and, therefore, the plaintiffs ought to be paid at least 10 times more the profits the plaintiffs earned for laying 45 piles and the expected earnings of the plaintiffs could be assessed at 10 % of the total bills which the plaintiffs would have prepared for laying 450 piles.

13.In the plaint, the plaintiffs had not given the break-up figure of Rs.3,12,000/- But PW.1 has given the said break-up figure as follows :

> Rs.1,08,000/- for idling of three sets and Rs.1,26,000/- for idling of the other three sets and Rs.51,835/- towards the idling of the personnel and Rs.26,165/- for the work done but not paid for.

As far as the last item is concerned, the learned trial Court has taken the note of the fact that the contract was terminated on 19.12.1991 and the bill for the work done was submitted on 20.12.1991 and, therefore, the plaintiffs' contention that the second bill did not cover the remaining work of piles done by the plaintiffs was not correct. In my opinion, no fault could be found with the said observations. Further, it may be observed that if the contract was terminated on 19.12.1991 and the bill was furnished on 20.12.1991, it could be safely inferred that the bill included the works which were completed or were in progress as on 19.12.1991, the date on which the contract was terminated. Besides, the plaintiff did not examine their technical person who had raised the subsequent bill for the part works which were not included in the said bill dated 20.12.1991 with details of the work done and sums to be paid and in such a situation, the claim of the plaintiffs for the said item of Rs.26,165/- was rightly rejected. Regarding the second last item of Rs.51,835/-, the plaintiffs gave no details as to how many personnel they had employed or for how many days and here again in the absence of such a details, the claim of the plaintiffs for the said sum of Rs.51,835/- could not simply be accepted only because the defendant had not contested the same. It was necessary for the plaintiffs to give the figure constituting the said amount of Rs.51,835/- to the satisfaction of the Court before the same could have been accepted, to be ordered to be paid by the defendant. As far as idling charges are concerned, the letter dated 23.10.1991 (Exhibit PW.1/C) of the plaintiff stipulates that "**No idle period is assumed by us for our quoted rates for any reason. We shall be paid Rs.2000/day in case we are forced to**

idle at site for reasons beyond our control." The learned trial Court, inter alia, observed that there is no whisper about the said payment of Rs.2000/- per day in the work order of the defendant. However, the fact remains that in the said work order dated 26.10.1991 (Exhibit PW.1/E) the defendant had agreed that all other terms and conditions applicable would be as per the plaintiffs' letter dated 23.10.1991 and that being so, it can be taken for granted that both the parties had agreed for the payment of the said idling charges at the rate of Rs.2000/- per day . However, the learned trial Court rightly concluded that the said clause relating to idling charges was not applicable because on 19.12.1991, the very contract of the plaintiffs was terminated and, therefore, there was no reason for the plaintiffs to have kept their said machinery idle at the site. The said idling charges were to be paid in case the machinery used or brought by the plaintiffs was required to remain idle for reasons beyond control of the plaintiffs. The case at hand, was a case of termination of the contract and, therefore, the plaintiffs were free to despatch the said machinery or shift it to any other place or mobilise the same away from the site after termination of the said contract. The said clause relating to idling charges was inapplicable to the case of the plaintiffs because the very contract was terminated and, therefore, as far as the claim of the plaintiffs concerning the said idling charges of Rs.3,12,000/- was concerned, the same was rightly rejected by the learned trial Court.

14. As far as the claim of Rs.3,00,000/- regarding compensation for premature termination of the contract is concerned, the learned trial Court has come to

an arbitrary conclusion that it has no substance. It is to be noted that the plaintiffs must have taken the work of laying down foundation of the said piles on the assumption that they would earn substantial profits from the same, considering that they were required to lay foundation of about 450 piles. However, the work of laying the said piles was terminated without any reason whatsoever, the moment they had completed 45 piles. The claim of reasonable compensation on account of premature termination of the contract of the plaintiffs with the defendant would not have been simply brushed aside in the manner done by the learned trial Court, as the plaintiffs must have taken the said work on the assumption that they would get the said work of laying foundation of about 450 piles and earn substantial profits therefrom and this is evident from the letter dated 23.10.1991 (Exhibit PW.1/C) written by the plaintiffs to the defendant.

15. Nobody is expected to work without profits, but at the same time it cannot be definitely said that the plaintiffs would have earned 10 % as profits. The plaintiffs claimed a sum of Rs.3,00,000/- without specifying the details or without specifying the losses sustained by the plaintiffs on account of the illegal and unforeseen termination of the contract by the defendant. If the amount of profits at 10 % is calculated on the basis of the two bills which were already submitted by the plaintiffs, then the amount in respect of work of 450 piles would work out to Rs.3,26,972/-. As said before, the defendant prematurely and without any reason terminated the contract and in that bargain must have certainly left the plaintiffs to fend for themselves and the plaintiffs must have certainly sustained some initial losses towards the

payment to be done to their labourers or towards the payment of hire charges of the machinery before they could redeploy the same to some other works. The plaintiffs did not give break-up figure of compensation of the said amount of Rs.3,00,000/- claimed by them, nor PW.1 Rajendra Upasani stated before the trial Court as to on what basis the compensation was being claimed. There can be no two opinions that the plaintiffs certainly required to be compensated for the premature and illegal termination of the contract by the defendant with the plaintiffs. Every one is expected to work for profits. But at the same time, it will be difficult to say whether the margin of profits expected by the plaintiffs was 10 % as contended. It could have been less, it could have been more. On the assumption that the plaintiffs would have earned profits, I am inclined to award to the plaintiffs 5 % of the total bill the plaintiffs would have submitted to the defendant for the foundation of 450 piles and that works out to Rs.1,63,381-50 (5 % of Rs.78,851-50 + 2,47,911-50 x 10) In my opinion, therefore, the said sum of Rs. 1,63,381-50 (rounded to Rs.1,63,382/-) will be a reasonable compensation payable to the plaintiffs on account of the premature and illegal termination of the contract by the defendant.

16. Consequently, the appeal deserves to succeed. The Judgment and Decree of the learned trial Court is, hereby, set aside and now the plaintiffs are held entitled to receive from the said defendant the said sum of Rs.1,63,382/- with pending and future interest at the rate of 8 % per annum from the date of the suit until payment.

N.A. BRITTO, J.